ARGUMENT

1. Petitioner first contends (Pet. 4–8) that he was denied the effective assistance of counsel because of the incompetence of his attorney. Petitioner was represented during the trial by retained counsel to whom he had paid a substantial fee. At the outset of the fourth and final day of trial, after the defense had presented most of its case, counsel sought to withdraw, asserting that he was ill. He presented his own affidavit to that effect, but no affidavit of any physician. Petitioner joined in the request. The trial judge stated that such a tactic by petitioner and his counsel had been anticipated and that he considered the effort improper, and ordered counsel to proceed (4 T. 3–7; Pet. 2–3). Counsel thereafter presented four more defense witnesses, had the prosecution stipulate to the testimony of three others who failed to appear voluntarily (4 T. 34–39; App. 21–25), and presented argument in petitioner's behalf (4 T. 41–55).

In an appendix of over one hundred pages, under eight separate headings, petitioner arranges and sometimes repeats portions of the trial transcript in an effort to show counsel's derelictions (App. 9–116). The record as a whole, however, shows that petitioner was vigorously defended by his retained counsel, and petitioner's assertion on this score is without merit. Petitioner gave his direct testimony almost exclusively in narrative form (2 T. 151–208, 3 T. 7–45). During the course of it, petitioner repeatedly cautioned, interrupted, and reprimanded his counsel (2 T. 156, 158, 160, 161, 184–185, 198, 201; 3 T. 44). This apparently

was part of a deliberate effort to make counsel appear incompetent. Even counsel's own opinion that he may have been ineffective is not controlling when, as in the present case, the record shows the contrary and provides substantial evidence of petitioner's guilt. See *United States* v. *Mooney*, 417 F. 2d 936, 941 (C.A. 8), certiorari denied, 397 U.S. 1029.

2. Nor is there merit in petitioner's claim (Pet. 8–9) that he suffered "fundamental unfairness" because the trial court denied his motion for new trial without a hearing and without granting subsequently retained counsel a requested delay. Petitioner was convicted on February 23, 1970. On February 24th he retained other counsel (App. 5), who filed a motion for new trial based on inadequacy of counsel—the single issue petitioner has raised, both in the court below and in this Court—and requested a hearing on that motion "one month after the transcript of evidence has been entered of record" (App. 3–4). On March 3, 1970, the court denied the new trial motion without a hearing (App. 7).

There is no requirement that a hearing be had on a motion for new trial; this, as well as the granting of the motion, is a matter left to the discretion of the trial court. Cf. *United States* v. *Cashio*, 420 F. 2d 1132, 1135–1136 (C.A. 5), certiorari denied, 397 U.S. 1007. Here, the trial judge had observed the conduct of petitioner's retained counsel and was in a position to know if the inadequacy claim was valid. Although new counsel requested a delay until the trial transcript was available, in this situation the transcript

was not necessary to the court's consideration of the challenge. In essense, this contention merely restates petitioner's sole point, that he received inadequate legal assistance. The court's conclusion that petitioner was adequately represented is fully supported by the record as a whole, as we note above. See *United States* v. *Johnson,* 327 U.S. 106, 111–112.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971